Nos. 24-CV-23, 24-CV-0685

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ELIZABETH GALVIN,

APPELLANT,

v.

RUPPERT NURSERIES, INC.,

APPELLEE.

On Appeal from the Superior Court for the District of Columbia, Civil Division in Case No. 2020 CA 000445 B (Honorable Donald W. Tunnage, Judge)

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Dated: October 21, 2024

RULE 28(a)(2) DISCLOSURE STATEMENT

Under D.C. App. R. 28(a)(2), Appellant Elizabeth Galvin states that these parties and counsel were involved in this matter in the D.C. Superior Court and in the appellate proceeding:

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I. JURISDICTIONAL STATEMENT

Appellant Elizabeth Galvin ("Ms. Galvin") seeks review of the D.C. Superior Court (the "Trial Court") decision disposing of all issues and claims of the parties in case 2020 CA 000445 B. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1). The Trial Court had jurisdiction pursuant to D.C. Code §§ 11-921(a), 28-3905(k)(1)(A), (k)(2) over Appellee Ruppert Nurseries, Inc. ("RN") and Ms. Galvin.

II. STATEMENT OF THE ISSUES

A. Whether the Trial Court erred as a matter of law in its treatment of Ms. Galvin's claims under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq.* by ruling that:

1. A consumer's state of mind and contractual goals are the proper subject of a court's CPPA analysis rather than a merchant's trade practices as viewed and understood by a reasonable consumer;

2. A merchant is not required truthfully to disclose and represent what a reasonable consumer needs to "make informed choices" about a merchant's goods or services because the CPPA provides merchants with "considerable discretion" to decide what disclosures to make to consumers;

3. A consumer's burden to prove liability and damages for unintentional misrepresentations and omissions that violate the CPPA is "clear and convincing evidence" rather than "a preponderance of the evidence";

4. A contractual statement of "no warranty" obviates a consumer's CPPA claims;

5. A qualified expert's unrebutted conclusion can be disregarded because specific scientific evidence the Trial Court deems "dispositive" is not presented; and

6. Proof of CPPA liability, which would entitle a consumer to an award of attorney's fees and statutory and punitive damages, requires proof of actual damages.

B. Whether, if this Court finds the Trial Court erred as a matter of law regarding one or more of Ms. Galvin's CPPA claims, it can determine without further Trial Court action that (a) RN is liable for its violations of the CPPA, and (b) RN's violation constitutes a rescission of the contract.

C. Whether the Trial Court erred as a matter of law in its treatment of the parties' contractual claims by:

1. Holding that a merchant can fulfill its contractual obligations without adhering to obligations specified in a contractually incorporated document; and

2. Holding that a merchant can prevail on a breach of contract claim when it repudiates the contract by failing to provide adequate assurance of performance.

D. Whether the Trial Court erred as a matter of law in failing to resolve all material issues, including several of Ms. Galvin's distinct CPPA and contract claims.

E. Whether the Trial Court erred as a matter of law in its treatment of Ms. Galvin's implied warranty of merchantability claims by *sua sponte* applying an inferred metric of merchantability not raised at trial ("alive after one year"), rather than the statutory ordinary purpose inquiry, to weigh her claims.

F. Whether the Trial Court (a) erred as a matter of law by denying Ms. Galvin's Motion for Reconsideration and Other Relief solely because Ms. Galvin "merely seeks to re-litigate issues already addressed by the Court"; and (b) abused its discretion by denying her Motion to Clarify Pursuant to Rule 52(a)(1).

G. Whether the Trial Court made findings of fact that were clearly erroneous, plainly wrong, or without evidentiary support.

III. STATEMENT OF THE CASE

On July 1, 2020, RN (a merchant) and Ms. Galvin (a consumer) entered a written contract (the "Contract") for her to pay RN $345,800 to provide goods and services related to RN's transplanting of six trees (the "Trees")[1] from several locations to her residence (the "Property"). JA[2] 2075–81. The Trees were to fulfill their agreed

[1] The Trees were three southern magnolias (the "Magnolias," and individually, a "Magnolia"), a cryptomeria (the "Cryptomeria"), a hemlock (the "Hemlock"), and a dogwood (the "Dogwood"). JA 2075–81. Another tree, a long-established Norway Maple (the "Maple") on the Property, died because RN failed to observe basic tree protection measures for established trees. *See infra* pp. 21–22.

[2] All references to the Joint Appendix ("JA") are to the JA page number. Citations to transcripts will be to the JA page number with the relevant line numbers. The witness is identified in parentheses thereafter. Citations to docket entries are designated by the name of that filing with the date identified in parentheses thereafter.

evergreen screening objectives (the "Project"), which aimed to restore the privacy screening for her elegantly landscaped Property. RN finished transplanting the Trees on July 23, 2020, *id.*, and "handed over" the Trees to Ms. Galvin's care on July 31, 2020, JA 152:14–16 (Lewis). The Trees immediately showed signs of distress. Ms. Galvin withheld payment of the Contract balance pending RN's assurance that it performed under the Contract. JA 2443–45. At no point during or after contracting did RN advise Ms. Galvin of any but one of the conditions posing challenges to the Project. None of the Trees provide the evergreen screening for which Ms. Galvin bargained.

RN sued Ms. Galvin for breach of contract. Compl. (Oct. 22, 2020). Ms. Galvin filed mandatory counterclaims alleging breach of contract, breach of the covenant of good faith and fair dealing, breach of the implied warranty of merchantability, and violations of §§ 28-3904(a), (d), (e), and (f) of the CPPA. Answer and Countercl. (Dec. 22, 2020). She later amended the counterclaim twice: in July 2021 to include identical claims regarding the dead or dying Hemlock and Cryptomeria, Am. Answer to Am. Compl. (July 22, 2021),[3] and in May 2022 to allege RN violated the CPPA by not informing Ms. Galvin that its digging for the Cryptomeria could damage, and eventually kill, her long-established Maple Tree, JA 054–080.

[3] In November 2021, Ms. Galvin moved for summary judgment which the Trial Court denied on February 17, 2022, citing material facts still in dispute. JA 030–050.

The Trial Court conducted a bench trial between June 5, 2023, and June 14, 2023. The parties submitted proposed findings of fact and conclusions of law,[4] made oral argument, and, at the Trial Court's request, filed post-trial briefing[5] on the "experienced user exception" ("EUE").[6] The Trial Court orally announced its opinion (the "Opinion") on September 27, 2023. JA 1723–51. It found for RN on its claim and Ms. Galvin's counter claims, except for finding that RN breached its implied warranty of merchantability regarding the Dogwood.[7] JA 1745:12–24.

Prior to the Trial Court's judgment (the "Judgment"), Ms. Galvin filed a praecipe noting a recent D.C. Superior Court decision on the CPPA's burden of proof. Def.

[4] Before the final day of trial, the Trial Court had advised the parties that they would have an opportunity for post-trial briefing. JA 415:8–17; JA 612:25–613:8. But the Trial Court stated on the last day of trial that it instead only wanted proposed findings of fact and conclusions of law with no case citations. JA 1544:1–18.

[5] Ms. Galvin sought, *inter alia,* to discuss the law of warranty suggested by RN and the Trial Court. Def. Renewed Mot. for Leave to File Rebuttal, Att. A at 14–20 (Aug. 25, 2023). The Trial Court denied her motion to file that briefing. JA 1726:1–2.

[6] The Trial Court, *sua sponte*, brought this issue to the parties' attention, stating the EUE "may be dispositive of this case." JA 1714:15–1717:1. Ms. Galvin's briefing "convinced the Court" that applying the EUE to her CPPA claims was "not appropriate." JA 1726:18–23. The EUE inquiry suggested the Trial Court believed CPPA claimants had to prove a merchant has a duty to warn independent of the CPPA's disclosure requirements, *see* JA 1714:22–1715:12, a belief that later manifested as an error of law in the Opinion, *see infra* p. 47 note 65.

[7] The Trial Court sought additional briefing to determine how to assess the damages RN owed to Ms. Galvin for the Dogwood. JA 1746:2–9. RN proposed deducting the contractual $2,900 cost of the Dogwood from RN's damages award, Praecipe Regarding Entry of J. (Sept. 29, 2023); Ms. Galvin claimed RN owed her the replacement cost of the Dogwood, attaching an affidavit with reasonable estimates of that cost. Def. Resp. to Pl. Praecipe for J. (Oct. 6, 2023).

Praecipe (Nov. 15, 2023). On December 7, 2023, the Trial Court entered Judgment, ordering Ms. Galvin to pay RN $578,171.15 for the remaining balance of the Contract (minus RN's proposed $2,900 deduction for the Dogwood), attorneys' fees, experts' fees, costs, and interest. JA 1752–53. The Trial Court ignored Ms. Galvin's praecipe. *Id.* Ms. Galvin timely appealed the Judgment on January 8, 2024.

On January 4, 2024, Ms. Galvin sought reconsideration and amendment of the Judgment and clarification of the Opinion to satisfy the requirements of Sup. Ct. R. Civ. P. 52(a)(1). JA 1754–85.[8] The Trial Court denied her motions on June 27, 2024. JA 1814–16. Ms. Galvin timely appealed that decision on July 26, 2024. This Court consolidated her appeals.

IV. STATEMENT OF FACTS

A. Ms. Galvin's Evergreen Screening Inquiry and RN's Failure to Disclose the Challenges Involved

On or about March 15, 2020, Ms. Galvin inquired about services to restore the evergreen screening on her densely planted and elegantly landscaped Property. JA 1886, 2058–59, 2465. She placed great value on restoring the screening of her Property and had high expectations and standards for a landscape contractor's performance. JA 1380:8–1382:25 (Galvin). She contacted RN, a subsidiary of a $300 million landscape conglomerate, JA 475:20–476:8 (Ruppert), that represented

[8] The Trial Court stayed the Judgment after Ms. Galvin posted adequate security. Order Approving an Irrevocable Letter of Credit as Security (May 1, 2024).

it was capable of meeting her goals, JA 2245–47 (RN website representing that RN "has a track record of effectively attending to the many details necessary to perform services cost consciously, meticulously and with a personal touch not found elsewhere.")

Joe Proskine, a certified arborist (who died in December 2020), was RN's lead on the Project. JA 137:18–25, 138:12–139:2 (Lewis). Ms. Galvin met Mr. Proskine on March 31, 2020, to discuss her evergreen screening objective. JA 1890. Mr. Proskine, in an April 20, 2020 email headed "Screening trees to back of property," suggested that a cryptomeria and magnolias would fit the purpose. JA 1892.

As planning proceeded, Ms. Galvin emailed Holt Jordan, an independent contractor guiding the Project's aesthetics, JA 993:18–19, 994:23–995:13 (Jordan), and Mr. Proskine on June 5, 2020, asking if she should "be concerned about the timing re[garding] the new heat." JA 2061–63. Mr. Proskine, replying only to Mr. Jordan, said the then-intended late June or early July transplant was "the time [RN] want[ed] to install the Magnolia to allow the most time to root" and noted the other Trees would "do fine with summer digging and proper maintenance." JA 2065. He did not identify any challenges to the Project. *Id.*

The next day, Mr. Proskine emailed Ms. Galvin that the "[t]iming of the work does not concern [RN]," because "[t]he Magnolia's [sic] thrive in this kind of weather" and the other Trees would "transplant well with proper care before and after planting."

JA 2068.[9] Ms. Galvin relied on this statement as "unequivocal assurance" that there was no elevated risk to summer planting and the Trees would transplant successfully given the stated weather and Property conditions. JA 1516:8–18 (Galvin). Later that day, Mr. Proskine provided Ms. Galvin with RN's proposal. JA 2303–05. He thanked her "for the opportunity to quote [her] on the work screening [her] property." JA 2303. He made a more formal proposal on June 12, 2020. JA 2298–2301.

After Ms. Galvin questioned the feasibility of Project logistics, *cf.* JA 1069:3–1070:16 (Norris), Howie Burrill, RN's logistics person, JA 244:18–24 (Burrill), visited the Property on June 24, 2020, JA 1072:21–1073:3 (Norris). His statement that the Project could not be executed within the time frame proposed by Mr. Proskine caused Ms. Galvin great concern regarding the Project's coordination with neighbors, diplomatic properties, and governing bodies. JA 1074:9–24 (Norris). After that conversation, Mr. Burrill told Craig Ruppert, RN's CEO, that he did not wish to pursue the Project. JA 249:6–9 (Burrill). Despite that objection, Mr. Ruppert decided that RN would go forward. JA 249:22–250:8 (Burrill).

The next day, Mr. Ruppert called Ms. Galvin (whom he knew personally), JA 1406:2–3 (Galvin), to discuss her concerns about the Project. JA 492:15–493:7

[9] Trial testimony showed landscape contractors try to avoid the risks of summer planting. *See* JA 1150:4–1152:6, 1153:8–1155:7, 1177:13–1178:2 (Mourlas). Even RN recognizes those risks by charging more for summer transplanting, JA 2246, which it did not charge to Ms. Galvin, JA 481:20–482:23 (Ruppert).

(Ruppert). He assured her that RN would make every effort to assure the purposes of the Contract. JA 493:17–22 (Ruppert). Ms. Galvin's experts established that RN could make such an assertion only if this statement was based on sound analysis, but RN had conducted no such analysis. *Infra* pp. 18–19.

On June 29, 2020, RN presented two new proposals: one with and one without a $157,900 "1 year 1 time 1 mobilization replacement warranty" (the "Warranty"). JA 2287–88, 2290–2292. It was limited to a replacement of plant materials, excluded "activities out of [RN's] control," and allowed RN to contest Ms. Galvin's post-maintenance care of the Trees. JA 2291. On July 1, 2020, at Mr. Lewis' suggestion, Ms. Galvin called Mr. Ruppert to discuss the proposals. *See* JA 1410:13–23 (Galvin). Mr. Ruppert told her that he would not take the Warranty because "the risk of loss" was "less than the cost of the warranty." JA 496:15–497:16 (Ruppert). Relying on RN's cumulative assurances of the Project's success, Ms. Galvin declined to purchase the Warranty. JA 1411:24–1412:5 (Galvin). RN sent Ms. Galvin the final proposal entitled "Galvin Evergreen Screening No Warranty";[10] it provided "[n]o warranty on plant materials supplied and installed by Ruppert Nurseries as part of

[10] The Contract and every prior RN proposal included "Galvin Evergreen Screening" in the header, demonstrating the parties' mutual purpose was evergreen screening. Even RN's expert realized that purpose. JA 857:20–22 (Schwartz) ("Obviously, I understand that it was to screen. Why else would [RN] be [] planting evergreens of that size?"); *see also* JA 138:1–5 (Lewis).

this contract." JA 2074–2081. Ms. Galvin signed the Contract and paid a deposit. JA 145:7–11 (Lewis).

B. The Evergreen Screening Contract

To meet the parties' agreed purpose of evergreen screening, the Contract required RN to provide and transplant the Trees[11] and stated that "[a]ll work shall be in accordance with the Landscape Specification Guidelines for the Baltimore Washington Metropolitan Area – 5th edition" (the "LSGs").[12] The LSGs require RN to "qualify[] [its] proposal to document any plant suitability or availability problems," JA 2359,[13] comply with basic industry practices to protect established trees on the Property, JA 2389–93,[14] and prepare the Trees for transplanting by pruning their roots well before transplantation, JA 2380.[15] The LSGs also provide that "[i]t is safe

[11] RN charges included $50,000 for each of two 30-foot Magnolias, $44,000 for a third 25 to 26-foot Magnolia, $56,000 for a 30-foot Cryptomeria, $2,900 each for a 12 to 14-foot Dogwood and a 10 to 12-foot Hemlock, and $140,000 for RN's use of a 500-ton crane. JA 2075. RN's typical markup was 50% of its costs, but RN charged Ms. Galvin a 794% and 68% markup for the Magnolias and the crane operation, respectively. *See* Def.'s Proposed Findings of Fact and Conclusions of Law ("DPFFCL") at ¶¶ 31–32 (July 31, 2023); *see also* JA 1174:3–12 (Mourlas) (Non-RN landscape contractor described RN's markup as "exorbitant").

[12] Throughout the Project, RN "held [itself] out to perform in accordance with these [LSG] standards." JA 199:10–12 (Lewis).

[13] Mr. Lewis and Mr. Burrill conceded at trial that RN did not conduct a suitability assessment prior to transplant. JA 170:6–14 (Lewis), 368:16–19 (Burrill).

[14] One of Ms. Galvin's experts explained that RN took no measures to protect the established Maple on her Property. *Infra* p. 21. RN provided no contrary evidence.

[15] Root pruning, which the LSGs state "shall be done before planting or during the planting operation," JA 2364, can mitigate the risks of digging and transplanting

to plant year round *if* certain criteria are followed. Plant material moved out of the normal planting season may require special treatment."[16] JA 2360 (emphasis added). Neither RN nor the LSGs informed Ms. Galvin what "certain criteria" and "special treatment" entail. Aside from recognizing that shade could reduce the screening capacity of the Trees over time, the Contract identified no challenges to the success of the Project. RN sourced the Magnolias from a grower located in Florida. JA 147:8–10 (Lewis). The rest of the Trees were sourced locally. JA 150:18–151:1 (Lewis). RN represented through photographs to Ms. Galvin that the Trees would satisfy the agreed evergreen screening purpose. JA 2249 (Dogwood), 2252 (Cryptomeria), 2255 (Hemlock), 2267 (Magnolias), 2307–09 (Magnolias).

RN began the final stage of transplanting the Trees on July 20, 2020, and finished on July 23, 2020. JA 2079–80. The Contract required RN to care for the Trees for eight days and then hand over maintenance to Ms. Galvin consistent with their advice in the Contract. *Id.* After the handover on July 31, 2020, RN was to monitor the Trees for six more weeks and generate weekly reports for Ms. Galvin that included any further care recommendations. *Id.*

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trees, JA 924:4–14 (Dahle). Mr. Burrill, who provided the only RN testimony regarding root pruning, stated that he did not root prune the Cryptomeria. JA 391:8–392:12 (Burrill).

[16] That LSG provision advised RN to consult "a professional horticulturist, nursery professional, or arborist . . . to determine the proper time, based on plant species and weather conditions, to move and install particular plant material to minimize stress to the plant." JA 2360. There is no evidence RN made such a consultation.

C. The Trees' Rapid Decline

On August 7, 2020, Ms. Galvin noticed considerable leaf shedding from each Magnolia. JA 1936. RN had not advised her to expect such shedding. *Id;* JA 2282. Mr. Proskine responded to Ms. Galvin's inquiry about the shedding in an August 11, 2020 email by downplaying the leaf volume that had dropped and reassuring her that such droppage was due to "cooler ground temperature . . . and water moving [through] soil." JA 2195. In an August 12, 2020 email to RN, Ms. Galvin wrote that the "possibility, or significance, of leaf drop" had never been disclosed by RN and that "the plants or the planting was not what [they] had agreed to" and asked to speak directly to the Magnolias' grower. JA 2198–99. Kelly Lewis, RN's general manager, did not put her in contact with the grower and replied that he did not believe the Trees were "at high risk of failure." He represented that RN had and would continue "to do everything [it] [could] to give these living trees the best chance for survival and to fulfil [sic] your expectations" and would "live and serve the purpose for which you intend[ed]." *Id.* Instead, during the August monitoring period, RN gathered "evidence" about the rainfall and drainage on the Property later used in litigation to deflect responsibility,[17] JA 449:23–450:24 (Burrill), and asserted that unforeseeable

[17] This evidence was not provided to Ms. Galvin, and therefore could only be of assistance to RN. JA 449:23–454:1 (Burrill).

conditions of weather and the Property caused the Trees' decline, *see*, *e.g.*, JA 2198–99, 2215–16, 2282.

After the Trees declined further, Ms. Galvin determined that she could no longer rely on RN's repeated assurances. JA 1416:14–1417:2 (Galvin). On August 21, 2020, she requested assurance that RN's performance had achieved the purpose of the Contract and withheld payment of the balance of the Contract price pending such assurance. JA 2443–45. Mr. Lewis did not provide such assurance but reiterated his previous explanation and newly speculated that pool water from Ms. Galvin's drainage system might have affected the Trees. JA 2215; *see also* JA 1417:3–15 (Galvin).

In early September 2020, Ms. Galvin, with RN's approval, hired Keith Pitchford, an independent arborist, to assess the Magnolias' leaf loss and prospects. JA 614:4–615:6 (Pitchford); JA 2231–33. He found that suitability issues diminished the Magnolias' evergreen screening qualities. He explained the Magnolias were suited neither for winters in D.C. nor for the transition from a light, airy soil in Florida to the Property's heavy clay soil, JA 619:1–9, 622:1–623:21 (Pitchford). RN had never brought these suitability issues to Ms. Galvin's attention. Mr. Pitchford also refuted RN's conjectures about the Magnolias' decline. JA 624:14–625:14 (Pitchford).

On September 9, 2020, to secure payment, Mr. Ruppert met at his request with Ms. Galvin. When Ms. Galvin asked what analyses supported RN's contracting and

performance, Mr. Ruppert exclaimed: "We don't do analytics." [18] JA 1419:2–14 (Galvin); *see also* JA 500:22–501:7 (Ruppert). Ms. Galvin, hearing for the first time that RN's prior assurances were not premised on sound analysis, questioned their reliability. JA 1419:20–23 (Galvin). Had RN informed her of its arboreal and business practices during the pre-contracting discussions, she would not have entered the Contract. JA 1506:1–1507:10 (Galvin).

In the year following the handover, the Trees continued to decline and failed to provide the evergreen screening Ms. Galvin had been assured of.[19] The Dogwood was dead by early September 2020. JA 2240, 536:14–23 (Siefers), 1093:16–18 (Norris). The Hemlock declined in the winter and died by May 15, 2021, within ten months after installation.[20] The Cryptomeria died from the top down and was "dead"

[18] This non-analysis contradicts RN's assurance of finding proper plant materials and preparing the Property for planting, JA 142:2–6 (Lewis), given that "each tree was an independent entity and each project was a different project," JA 374:22–24 (Burrill).

[19] *See* JA 797:23–798:6 (Musick) (stating that two trees "failed almost immediately" to meet Ms. Galvin's purpose, the other trees "weren't providing the screening she was expecting," and this "was a specific very expensive landscaping project that was an epic fail"); JA 855:22–856:21 (Schwartz) (recognizing that the Cryptomeria does not achieve the Contract's evergreen screening goal).

[20] Expert testimony from Dr. Dahle, JA 935:6–936:4 (Dahle), testimony from Mr. Siefers, JA 537:3–12 (Siefers), and photographic evidence from May 15, 2021 (admitted without objection from RN), JA 2243, established this fact conclusively.

(under the LSG definition) by May 15, 2021; the tree was over 25% dead and the tree's main leader would not recover from its die back.[21]

D. RN Files This Lawsuit

As discussions were ongoing, on October 22, 2020, RN sued Ms. Galvin, alleging she breached the Contract by failing to pay the balance on the Contract amount. Ms. Galvin filed a mandatory counterclaim. She contended that RN violated her right to information required under the CPPA by (1) representing that the Trees and RN's services to transplant them had evergreen screening (i) "characteristics," "uses," and "benefits," and (ii) "standard[s], qualit[ies], grade[s], style[s], or model[s]" that they did not have;[22] (2) misrepresenting (i) the extent and quality of the services it would provide and (ii) the material risks involved with planting the Trees in July; [23] and (3) omitting that its assurances regarding the Project's success were not based on sound

[21] *See*, *e.g.*, JA 855:1–856:9 (Schwartz) (stating that the Cryptomeria had a six to eight foot section of die-back at the top during his visit and that the top would not recover), 537:13–538:2 (Siefers) (explaining that the tree began desiccating from the top down and has only continued to die further), 797:24–798:1 (Musick) (observing the Cryptomeria was two-thirds dead in November 2022), 937:3–8 (Dahle) (stating that Ms. Galvin's admitted photo "looked very similar" to the Cryptomeria's state during his May 23, 2021 visit), 2285 (picture from May 2021).

[22] *Compare*, *e.g.*, *supra* p. 11 (pictures of the Trees before transplant); *supra* pp. 9, 12 (RN's promise that Trees will provide screening); JA 1892 (RN states that the Cryptomeria and Magnolias would "work in the conditions at the planting area") *with supra* pp. 12–15 (descriptions and pictures of the Trees after transplant).

[23] *See* JA 493:17–22 (Ruppert), 1403:10–1406:19 (Galvin), 2198 (RN statements that it has done "and continue[s] to do everything we can . . . to fulfil [sic] your expectations"); *supra* p. 10 notes 13, 14, 15, p. 11 note 16 (RN failed to perform according to industry guidelines); *supra* p. 7 (RN claims no risk in summer planting).

analysis.[24] JA 076–78; DPFFCL at ¶¶ 60, 62, 63, 66. Ms. Galvin sought compensatory damages, statutory or treble damages (whichever is greater), punitive damages, and reasonable attorney's fees as a remedy for RN's unfair and deceptive trade practices. JA 078–079; DPFFCL at ¶¶ 110–120.

She also alleged that RN (1) breached the Contract by failing to comply with various LSG provisions and provide evergreen screening, JA 072–74; DPFFCL at ¶ 125; (2) breached the duty of good faith and fair dealing by injuring her rights to enjoy the fruits of the Contract by failing to provide truthful information about the Project, JA 074–75; DPFFCL at ¶ 122; and (3) breached the implied warranty of merchantability by providing Trees that were not fit for the ordinary purpose of evergreen screening, JA 075–76; DPFFCL at ¶ 123. When the Hemlock and the Cryptomeria began to die in Spring 2021, Ms. Galvin amended her counterclaim to include those Trees as well.

E. The Maple's Death

Ms. Galvin's long-established Maple, which stood directly beside the hole dug for the Cryptomeria and added screening to the back of the Property since the mid-1990s, was "in good health and vigor" before the Project began. JA 1219:16–20, 1221:5–25 (Shaw); *see also* JA 2058, 2355. In September 2021, Mr. Siefers, a contractor

[24] *See supra* p. 10 note 13 (RN failed to perform requisite analyses of conditions and risks).

arborist who provided general maintenance for trees on the Property, JA 503:5–22, 546:2–3 (Siefers), informed Ms. Galvin that the Maple was dead. JA 2273; JA 542:10–19 (Siefers). She amended her counterclaim again in May 2022, asserting RN violated the CPPA by failing to inform her that cutting the roots of the Maple within its Critical Root Zone ("CRZ")[25] when digging a hole for the Cryptomeria would damage the Maple. JA 077, 079; DPFFCL at ¶¶ 30, 36, 66.

F. The Trial

The case was tried before the Honorable Associate Judge D. W. Tunnage from June 5–14, 2023, with closing arguments on August 8. RN presented a simple case that it did all it was contractually required to do: dig holes, source, transport, and transplant trees, and water them for 10 days, *see*, *e.g.*, JA 107:25–108:23 (RN Counsel), and that it had no disclosure or special care requirements arising from the formation of the Contract or its agreed purpose of the Project. RN's case was that any required disclosures relating to the Project were solely the responsibility of Ms. Galvin and her other contractors (none of which were parties to the Contract nor had obligations under the Contract or the CPPA). JA 105:17–106:1, 116:13–118:11, 1571:3–1572:2, 1589:11–1590:3 (RN Counsel). Countering RN, Ms. Galvin's other

[25] A tree's "critical root zone" is "the area of the roots that must be maintained or protected for the tree's survival." JA 2389.

contractors and expert witnesses[26] testified RN had not met its duty to properly inform Ms. Galvin about the Project, and that its failure to perform those obligations had serious consequences for the Trees.

Cindy Musick is a certified arborist with a degree in environmental science and policy from Johns Hopkins University working on a doctorate in forestry at West Virginia University, JA 720:11–721:20 (Musick). She was qualified to opine on the health, planting, transplanting, and maintenance of trees from her experience as a purchaser of trees, JA 723:9–22, 726:2–9 (Musick). She explained that, for a consumer to make informed purchases of large trees, a landscape contractor must analyze and disclose conditions that can present risk to major transplanting projects. JA 728:4–17, 733:6–746:21 (Musick). She stated that a consumer would reasonably expect a landscape contractor to supply information necessary "to understand the likelihood of success of a project," JA 754:3–10 (Musick), and would be surprised if risks to the Project were not disclosed, JA 761:18–763:9 (Musick). Ms. Musick

[26] Her other contractors (Buddy Ziegler, Mr. Jordan, Mr. Norris and Shawn Siefers) testified about the facts. Two experts testified on what a reasonable consumer can expect from a transplant contractor. JA 728:7–17 (Musick), 1134:9–1136:6 (Mourlas). One expert testified on what caused the decline of the transplanted Trees. JA 924:18–926:13 (Dahle). Mr. Pitchford testified about the Magnolias. JA 616:1–620:23 (Pitchford). Martin Shaw, an expert on the risks associated with planting and preserving large trees, JA 1205:3–19 (Shaw), testified that the Maple died because RN failed to preserve its roots as required by industry standards, including the LSGs, JA 1226:3–1229:21 (Shaw).

observed that the Project was an "epic fail" in fulfilling Ms. Galvin's evergreen screening purposes. *See supra* p. 14 note 19.

Chris Mourlas is a landscape contractor and certified arborist qualified to opine on the duty of landscape contractors to identify, assess, and disclose risks. JA 1117:24–1118:5, 1130:6–13 (Mourlas). He explained that landscape contractors must disclose risks even if the contractor thinks mitigation is possible because a consumer cannot be expected to know of those risks. JA 1135:17–1136:6, 1141:22–1143:2 (Mourlas). The consumer relies upon the merchant due to its superior and specialized knowledge. JA 1133:12–23, 1134:23–1136:6 (Mourlas). Disclosure of those risks is paramount if a consumer declines a proffered warranty. JA 1337:5–17 (Mourlas).

Together, Mr. Mourlas and Ms. Musick established that a landscape contractor cannot advise a consumer that their project will likely succeed without (1) assessing conditions and their associated risks, (2) assessing how best to mitigate risks and maximize the opportunity for success, and (3) disclosing that assessment to the consumer. JA 730:17–731:23, 761:18–23 (Musick), 1134:23–1136:6 (Mourlas). When transplanting large trees, a landscape contractor must assess and then disclose conditions, including summer heat, transportation, drainage, the nature of the soil, and the compatibility of conditions where the trees were grown with conditions at the transplant location. JA 728:18–729:10, 733:6–743:19 (Musick), 1150:4–1155:7, 1163:23–25 (Mourlas).

In response, RN presented Jeffrey Schwartz, a landscape contractor, who was qualified "as an expert arborist with specialized knowledge in residential tree care, arboriculture, and the standard of care for the sale of landscape materials in the DMV." JA 814:25–815:11 (Schwartz). He opined that risks presented by transplanting trees need not be disclosed to a *consumer* when the landscape contractor, in its *sole discretion*, believes the risks can be mitigated. JA 833:4–834:11, 840:2–9 (Schwartz). Mr. Schwartz nonetheless recognized that planting large trees in the summer posed heightened risks absent in cooler months. JA 832:11–25 (Schwartz). Mr. Schwartz had no evidence that RN mitigated such risks, relying only on RN's reputation within the industry. *E.g.*, JA 848:11–849:4 (Schwartz). He also conceded that the Cryptomeria did not provide evergreen screening. *See supra* p. 14 note 19.

Dr. Gregory Dahle, Professor of Arboriculture and Urban Forestry at West Virginia University, JA 878:5–10 (Dahle), was qualified to opine on arboriculture with an expertise in the growth and development of trees. JA 884:19–21 (Dahle). He explained there are real consequences to a landscape contractor's failure to analyze and advise of planting risks to a consumer. JA 912:24–915:18 (Dahle); *see also* JA 738:23–739:13 (Musick). He opined that undisclosed challenges had consequences that prevented the Trees from properly transporting water through their systems, causing transplant shock. JA 924:18–927:4, 929:1–10, 940:4–10 (Dahle). He also

opined that transplant shock to the Magnolias, including transport shock due to their shipment from Florida, led them to suffer further physiological stress and drop their leaves. JA 926:23–927:4 (Dahle). Because of transplant shock, none of the Trees provided the evergreen screening for which Ms. Galvin bargained. *See*, *e.g.*, JA 2240, 2243, 2285, 2471; *supra* p. 14 note 19.[27]

Record evidence established that, when encountering established trees, landscape contractors are required by the LSGs and basic industry practice to preserve the established trees' CRZ.[28] *See* JA 2389, 2393; *see also* JA 195:9–25 (Lewis), 1226:3–1227:11 (Shaw). In this case, RN was required to protect the Maple's roots within a 14-foot radius of its trunk. *See* JA 1226:4–14 (Shaw), 1330:11–15 (Feather). Any digging within that radius could harm the Maple. *See* JA 1229:15–21 (Shaw). RN did not inform Ms. Galvin of that material threat. JA 1502:16–1503:8 (Galvin).

Mr. Shaw testified RN did not take the measures required to protect the Maple. JA 1227:8–15, 1237:6–14 (Shaw). He concluded that RN dug within three feet of the Maple, JA 1226:3–1228:14 (Shaw), causing the Maple's death, JA 1229:15–21, 1237:17–1239:20, 1264:12–1265:8 (Shaw), and that RN, as it required in the Contract, used a stump grinder, JA 1228:2–6 (Shaw), which the LSGs provide

[27] RN's cross examination of Dr. Dahle focused mainly on his opinions of risk warnings that a landscape contractor might be required to give to customers about certain possible occurrences, JA 952:24–965:3 (Dahle), a subject on which Dr. Dahle was not qualified to opine, JA 884:19–21 (Dahle).

[28] A Tree Protection Plan is a standard preservation method. JA 1226:3–10 (Shaw).

should be neither "operat[ed] [n]or stor[ed]" "within the tree protection area," JA 2392. Based on the presence of rhizomorphs,[29] he concluded RN's digging (by stump grinder or hand) injured the tree such that it could not fight off infections, including Armillaria, a fungal pathogen that causes root rot. JA 2347, 1236:24–1238:4, 1238:23–1239:4 (Shaw). Such infections caused the tree to suffer "extreme" and "traumatic" stress a year after the installation. JA 1231:3–21 (Shaw). Mr. Shaw determined that the cost to replace the Maple using a crane would be $175,600. JA 1245:7–16 (Shaw).

Dr. Feather, RN's expert qualified to testify on plant pathology, JA 1305:15–24 (Feather), stated that he did not "believe" Armillaria killed the Maple, JA 1307:20–22 (Feather), but was unsure what caused the tree's death, JA 1358:17–1359:7 (Feather). Dr. Feather merely opined that Mr. Shaw had not proven that the tree died specifically from Armillaria because: (1) he did not present a positive lab diagnosis for Armillaria, JA 1307:20–25 (Feather), and (2) there were other "hypothetical" causes of death, JA 1306:5–1307:12, 1308:5–9, 1322:23–1323:2; 1324:10–25 (Feather). None of those alternatives withstood cross-examination. JA 1327:8–1329:6, 1333:24–1334:8, 1357:15–1358:16, 1359:22–1360:17 (Feather); *see also* JA 670:5–17 (Ziegler). He provided no evidence against Mr. Shaw's conclusion that

[29] "Rhizomorphs" are fungal structures that provide "conclusive" evidence of an Armillaria infection. JA 1281:12–13, 1284:25–1285:6 (Shaw); *see also* JA 1244:6–9 (Shaw).

digging within the CRZ killed the Maple and admitted that RN dug within the Maple's CRZ. JA 1331:10–13, 1332:3–6 (Feather).

G. The Trial Court's Opinion, Judgment, and Denial of Post-Judgment Motions

The Trial Court announced its Opinion on September 27, 2023. Regarding Ms. Galvin's CPPA claims, it ruled that the burden of proof is clear and convincing evidence. JA 1742:17–21 (citing *Pearson v. Chung*, 961 A.2d 1067, 1074 (D.C. 2008)). The Trial Court found Ms. Galvin's claims could not meet this heightened standard because (1) she declined to buy the Warranty, JA 1743:11–17; (2) her claims were based on "subjective satisfaction," JA 1741:22–24, 1743:13–23; (3) the Contract did not include evergreen screening, JA 1741:25, 1744:8–14; and (4) the merchant (RN) had "considerable discretion" over what was material under the CPPA. JA 1744:15–1745:11.

Applying the "considerable [merchant] discretion" standard, the Trial Court found that RN's statements about summer planting were sufficient and truthful disclosures because they communicated its "belief" that (1) "the risk associated with summer planting was not one that considered [sic] it," and (2) risks can "be mitigated if not successfully protected against by proper care and maintenance before and after

transplanting." JA 1744:21–1745:5. The Trial Court also found the LSGs contained an "explicit reference of risk in [summer] transplanting."[30] *See* JA 1745:6–11.

The Trial Court mischaracterized Ms. Galvin's CPPA claims regarding the Maple as a "defense to [RN's] breach of contract" claim, JA 1737:17–22, and did not consider whether RN's failure to advise of the risks of digging within the Maple's CRZ amounted to a CPPA violation, *see* JA 1737:23–1738:3. Instead, ignoring the evidence of record, it focused solely on whether the Maple died from a specific pathogen, Armillaria, claiming that issue was "dispositive." JA 1738:4–16. The Trial Court found that Ms. Galvin did not establish that Armillaria caused the Maple's death because Mr. Shaw did not have "any affirmative tests or lab results to confirm [his] diagnosis" to outweigh the purportedly "conflicting evidence" of RN's expert. JA 1738:17–1739:3. The Trial Court therefore deduced that the Maple claims could not meet the relevant burden of proof. JA 1739:10–12. The Trial Court did not address Ms. Galvin's claim that a violation of the CPPA in contracting or performance was a defense to RN's contract claim.[31]

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[30] Perhaps the Trial Court was referring to the LSG provision stating "[i]t is safe to plant year round if certain criteria are followed," which provides no information about the specific risks associated with summer planting or implementable mitigation measures. *See* JA 2360.

[31] The Trial Court concluded that RN did not breach the duty of good faith and fair dealing because it could find neither "willful imperfect performance" nor "interference with [Ms. Galvin's] ability to perform . . . her obligations under the contract." JA 1739:13–24.

Regarding RN's contract claim, the Trial Court concluded: (1) there was a valid contract; (2) RN met its contractual obligations by merely "install[ing] six trees," "hav[ing] a transfer of maintenance," and conducting a "monitoring period of six weeks"; (3) Ms. Galvin "was responsible for completing the payment as agreed to by contract"; (4) Ms. Galvin did not provide that payment;[32] and (5) RN "established that it was damaged by the failure to pay." JA 1733:1–25. Regarding Ms. Galvin's breach of contract counterclaim, the Trial Court stated there was no evidence of poor drainage that RN had to report to Ms. Galvin.[33] JA 1735:23–1736:4. It acknowledged that Ms. Galvin alleged other breaches of the Contract but did not address those claims, *see* JA 1735:16–22, including RN's lack of compliance with other LSG provisions.

Incorrectly relying on the model LSG warranty, the Trial Court found against Ms. Galvin on her claim of breach of the implied warranty of merchantability for five of the Trees simply because they remained "alive" one year after installation, JA

[32] The Trial Court also claimed that Ms. Galvin, during neither the transfer of maintenance nor the monitoring period, identified an issue with the Trees, JA 1734:17–23, even though she identified the Magnolias' leaf drop and requested RN to provide her with adequate assurance of its performance within the monitoring period. JA 1936, 2198–99. This was an error of fact.

[33] In finding there were no significant drainage concerns, the Trial Court ignored RN's speculation that existing drainage problems on the Property killed the Maple. See JA 1322:23–1323:2 (Feather). The Trial Court then used that speculation to dismiss Mr. Shaw's conclusive evidence on the Maple's cause of death. *See* JA 1738:17–19, 1739:1–3.

1739:25–1740:14; *see also* JA 1730:23–1731:11.[34] Since the Trial Court found, contrary to the record, that the Magnolias and the Cryptomeria were "alive" three years after installation and the Hemlock was "alive for at least ten months," it held that those trees, as planted, were not defective and therefore merchantable. JA 1740:11–23. Because the Dogwood was indisputably dead by September 2020, it found for her regarding that tree. JA 1740:24–1741:15.

The Trial Court denied Ms. Galvin's motions for reconsideration of the Judgment, and amendment of the Opinion to satisfy Rule 52(a)(1).[35]

V. STANDARD OF REVIEW

"In an appeal from a bench trial, [this Court] review[s] the trial court's legal conclusions de novo and factual findings for clear error." *District of Columbia v. Bongam*, 271 A.3d 1154, 1162 (D.C. 2022); *see also* D.C. Code § 17-305(a) ("When the case was tried without a jury, the court may review both as to the facts and the law, but the judgment may not be set aside except for errors of law unless it appears

[34] This LSG provision provides that a tree must be "alive *and* in satisfactory growth" one year after planting. JA 2362 (emphasis added). The Trial Court's partial application of that standard is another an error of law. It also highlights the Trial Court's arbitrary use of the LSG standards. It used one part of the model LSG warranty's two-part test, (which was not the Warranty offered by RN and declined by Ms. Galvin, *see* JA 2291), to dispose of Ms. Galvin's merchantability claim but refused to analyze RN's compliance with other LSG standards, such as its tree protection requirements, in assessing her CPPA and Contract claims.

[35] The Trial Court ruled (1) Ms. Galvin could not "re-litigate" issues the Trial Court had addressed and (2) it "believe[d] the controlling factual and legal grounds for its final judgment were sufficiently addressed on the record." *See* JA 1814–15.

that the judgment is plainly wrong or without evidence to support it."). Findings "induced by, or resulting from, a misapprehension of controlling substantive legal principles lose the insulation of [Super. Ct. R. Civ. P.] 52(a), and a judgment based thereon cannot stand." *Murphy v. McCloud*, 650 A.2d 202, 210 (D.C. 1994) (quoting *Davis v. Parkhill Goodloe Co.*, 302 F.2d 489, 491 (5th Cir. 1962)).

A factual finding "is clearly erroneous 'when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Murphy*, 650 A.2d at 209–10 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). This Court will "not sustain findings in which the trial court has 'rejected or failed to draw the inferences which we find inescapable from the record as a whole.'" *Id.* at 210 (quoting *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1203 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983)).

The Trial Court's decision whether to grant or deny a motion under Super. Ct. R. Civ. P. 52(a)(1), 52(b), and 59(a)(1) are each reviewed for abuse of discretion. *See*, *e.g.*, *Nat'l Metal Finishing Co. v. BarclaysAmerican/Com., Inc.*, 899 F.2d 119, 124–25 (1st Cir. 1990) (52(b) motion); *Fisher v. Best*, 661 A.2d 1095, 1098 (D.C. 1995) (59(a)(1) motion). Although a Rule 59(e) motion "lies within the broad discretion of the trial court," *Wallace v. Warehouse Emps. Union No. 730*, 482 A.2d 801, 810 (D.C. 1984), "Rule 59 motions that claim an error of law are reviewed *de novo*,"

Callahan v. 4200 Cathedral Condo., 934 A.2d 348, 353 (D.C. 2007) (quoting *Nichols v. First Union Nat'l Bank,* 905 A.2d 268, 272 n.2 (D.C. 2006)).

VI. SUMMARY OF ARGUMENT

The Trial Court committed errors of law under the CPPA by (a) misapplying the reasonable consumer standard set forth in *Pearson v. Chung*; (b) finding that merchants have "discretion" over what must be disclosed to consumers; (c) again misusing *Pearson* to find that the burden of proof in a CPPA case alleging unintentional misrepresentations and omissions was clear and convincing evidence rather than a preponderance of the evidence; (d) finding that Ms. Galvin, by declining RN's Warranty, waived her CPPA claims; (e) requiring Ms. Galvin to prove actual damages to prove RN's liability for misrepresentations and omissions regarding the Maple; and (f) substituting its judgment for an expert's judgment on the cause of death of the Maple. This Court should hold that RN violated the CPPA and that violation constitutes a rescission of the Contract, which nullifies RN's breach of contract claim.

The Trial Court committed errors of law regarding Ms. Galvin's contract claim by holding RN fulfilled its contractual obligations without showing it adhered to the LSGs and prevailed on its contract claim even though it repudiated the Contract.

The Trial Court committed an error of law regarding Ms. Galvin's implied warranty of merchantability claims by *sua sponte* applying an inferred standard for

merchantability instead of determining whether the Trees were fit for their ordinary purpose of evergreen screening. The Trial Court also committed errors of fact by determining two of the Trees were not dead within a year.

The Trial Court committed errors of law in not granting Ms. Galvin's motion for reconsideration when its Opinion clearly failed to address all material issues, contained significant errors of law, and contained clear errors of fact.

VII. ARGUMENT

Many of the Trial Court's errors of law arose from the "lens" it used to view Ms. Galvin's claims. The Trial Court disregarded the requirements the law imposes on landscape contractors executing expensive transplants of mature trees, and instead used a "lens" focusing on Ms. Galvin's supposed "dissatisfaction," "displeasure," "unhappiness," and its erroneous inference that she expected this litigation from the outset. *See* JA 1732:17–20, 1735:2–14, 1743:18–23. This focus on the consumer's state of mind—a subjective standard—rather than a merchant's legal duties to a reasonable consumer—an objective standard—distorted the Trial Court's judgment.

A. The Trial Court Erred as a Matter of Law by Ignoring the CPPA's Purposes and Requirements

1. The Purposes and Requirements of the CPPA.

The D.C. Council enacted the CPPA to (1) "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices"; (2) "promote, through effective enforcement, fair business practices throughout the

community"; and (3) "educate consumers *to demand high standards and seek proper redress of grievances*." D.C. Code § 28-3901(b) (emphasis added). The CPPA "establishes an enforceable right to truthful information from merchants about consumer goods and services" and must be "construed and applied liberally to promote its purpose." *Id.* § 3901(c). It requires merchants to accurately disclose and represent all information needed for a reasonable consumer to "make informed choices" about a merchant's goods or services. *Mann v. Bahi*, 251 F.Supp.3d 112, 120 (D.D.C. 2017). The CPPA's remedies are aimed entirely at correcting merchants' unlawful trade practices.[36]

Regardless of whether any consumer is misled, deceived, or damaged, it is unlawful for a merchant to: (1) "represent that goods or services have . . . characteristics, . . . uses, [and] benefits . . . that they do not have"; (2) "represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another"; (3) "misrepresent as to a material fact which has a tendency to mislead"; or (4) "fail to state a material fact if such failure tends to mislead." D.C. Code §§ 28-3904(a), (d), (e), and (f).[37]

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[36] This Court regularly "look[s] to courts' interpretations of [other] state consumer-protection statutes in construing the CPPA" because "consumer protection laws tend to share common principles across the country." *Center for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109, 118 (D.C. 2022).

[37] Unlike claims under §§ 3904(e) and (f), claims under §§ 3904(a) and (d) "do not require a material misrepresentation that has a tendency to mislead," so "the analysis

Under the CPPA, a fact is material if:

> "(1) a reasonable [consumer] would attach importance to its existence or nonexistence in determining [their] choice of action in the transaction in question; or (2) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining [their] choice of action, although a reasonable [consumer] would not so regard it."

Saucier v. Countrywide Home Loans, 64 A.3d 428, 442 (D.C. 2013) (quoting RESTATEMENT (SECOND) OF TORTS § 538(2)). The CPPA "does not require a plaintiff to plead and to prove a duty to disclose information." *Id.* at 444.

"[A] claim of an unfair trade practice is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer." *Pearson*, 961 A.2d at 1075.[38] It must be analyzed from the perspective of a "reasonable consumer acting reasonably under the circumstances" of the particular transaction. *Alce v. Wise*

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of whether a reasonable consumer would be misled under the circumstances does not apply to those provisions." *See Alce v. Wise Foods, Inc.*, No. 17 CIV. 2402 (NRB), 2018 WL 1737750, at *9 n.8 (S.D.N.Y. Mar. 27, 2018) (explaining standard for § 3904(a)).

[38] In *Pearson*, the plaintiff argued that a merchant's "satisfaction guaranteed" sign was an "unconditional and unlimited warranty of satisfaction to the customer as determined solely by the customer, without regard to the facts or to any notion of reasonableness." *Id*. at 1075. This Court found that Pearson's subjective standard was inconsistent with how the "satisfaction guaranteed" sign would be viewed and understood by a reasonable consumer. *Id.* Several consumers testified that the merchant's "satisfaction guaranteed" sign meant only that the defendants must rectify plaintiff's "dissatisfaction" resulting from their error and provide reasonable compensation if that error cannot be rectified. *Id.* The plaintiff's interpretation of "satisfaction guaranteed" did not match the interpretation on the record, so his CPPA claim was unreasonable. *Id.*

Foods, Inc., No. 17 CIV. 2402 (NRB), 2018 WL 1737750, at *8–9 (S.D.N.Y. Mar. 27, 2018) (applying this analysis to claims made under § 3904(a), (e), (h), and (x)).[39]

The burden of proof to show an *unintentional* misrepresentation or omission in violation of the CPPA—the basis of all Ms. Galvin's CPPA claims—is a preponderance of the evidence.[40] The burden of proof for CPPA claims alleging *intentional* misrepresentations is clear and convincing evidence.[41] But there is no support in D.C. law that this higher burden of proof extends to CPPA claims alleging unintentional conduct.[42] Courts have determined the burden for unintentional CPPA violations to be a preponderance of the evidence—the default standard in civil cases

[39] This approach is consistent with other jurisdictions. *See*, *e.g.*, *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 395–96, 813 N.E.2d 476, 487–88 (2004) (describing the FTC's standard).

[40] Violations of §§ 3904(a), (d), (e), and (f) do not require a showing that a defendant acted with intent, *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 (D.C. 2008); *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020), and Ms. Galvin's claims do not allege intent. Therefore, her burden of proof, other than for punitive damages, is a preponderance of the evidence.

[41] *Osbourne v. Capital City Mortgage Corporation*, 727 A.2d 322, 325 (D.C. 1999).

[42] *Pearson* does not support a higher burden for claims of unintentional conduct. This Court relied on *Osbourne* for its holding regarding the burden of proof. *Pearson*, 961 A.2d at 1074 (citing *Caulfield v. Stark*, 893 A.2d 970, 976 (D.C. 2006), which in turn quotes *Osbourne*, 727 A.2d at 325). Moreover, this Court was not presented with the occasion to rule on the burden of proof for unintentional CPPA claims, as the plaintiff alleged intentional violations. *See*, *e.g.*, *Pearson*, 961 A.2d at 1070 (describing plaintiff's CPPA claim as alleging "defendants did not honor and had no **intention** of honoring" their satisfaction guaranteed sign) (emphasis added). And this Court's reiteration in *Frankeny* of the burden of proof proposition in *Pearson* is mere dicta because that issue was not before this Court. *See Frankeny*, 225 A.3d at 1005 (quoting *Pearson*, 961 A.2d at 1074).

and for similar common law claims.[43] *See*, *e.g.*, *District of Columbia v. EADS LLC*, 2018 CA 005830 B, 2023 WL 8850054, at *11 (D.C. Super. Ct. Aug. 28, 2023). The *EADS* court recognized that (1) the D.C. Court of Appeals "has not yet established the burden of proof for unintentional misrepresentations and omissions claims pursuant to the CPPA"; (2) the Superior Court has routinely applied the preponderance of the evidence standard to cases involving unintentional conduct; and (3) "applying a demanding burden of proof would contravene the purpose[44] of the [CPPA]." *Id.*[45] Similarly, "the highest courts of several states have concluded that the preponderance of the evidence standard applies under their own states' similar statutes." *Ballagh v. Fauber Enterprises, Inc.*, 290 Va. 120, 128, 773 S.E.2d 366, 370 (2015) (collecting cases from 11 other states).[46]

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[43] *E.M. v. Shady Grove Reproductive Science Center P.C.*, 496 F.Supp.3d 338, 401 n.23 (D.D.C. 2020) (holding that claims of negligent misrepresentation under D.C. law require only a preponderance of the evidence); *In re Est. of McKenney*, 953 A.2d 336, 342 (D.C. 2008) (holding that a claim of contract rescission based on innocent material misrepresentation must only be shown by a preponderance of the evidence).

[44] The D.C. Council sought to "overcome the pleadings problem associated with common law fraud claims by eliminating the requirement of proving certain elements such as intent to deceive." *Id.* (quoting *Saucier*, 64 A.3d at 442).

[45] The *EADS* court explained in a prior ruling that *Frankeny*'s "imprecise language" regarding the burden of proof is not controlling. *District of Columbia v. EADS LLC*, No. 2018 CA 005830 B, 2022 WL 4010012, at *3 (D.C. Super. Ct. Aug. 31, 2022).

[46] Counsel has identified only one exception to this overwhelming trend. *See Deer Creek Const. Co. v. Peterson*, 412 So. 2d 1169, 1173 (Miss. 1982). However, the *Peterson* court did not analyze the purposes of Mississippi's consumer protection statute and merely assumed the burden of proof for common law fraud applied.

A "no warranty" provision in a consumer-merchant contract does not excuse a merchant's duty to accurately represent its goods and services to consumers. Courts have held that even "as is" disclaimers (which are far more limiting than "no warranty" provisions) do not allow a merchant to avoid liability under a consumer protection statute. *E.g.*, *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992). Were that not the case, the merchant could avoid CPPA liability simply by drafting a contract in a way that absolves it of compliance. Absent express waiver, CPPA protections are unaffected by any contractual provision.[47]

A consumer need not prove damages to prove a merchant is liable under the CPPA. "[A]ny person engag[ing] in an unfair or deceptive trade practice, **whether or not any consumer is in fact misled, deceived, or damaged thereby,**" violates the CPPA. D.C. Code § 28-3904 (emphasis added). Proving a violation means a plaintiff "may recover or obtain the following remedies: (A)(i) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer . . .; (B) Reasonable attorney's fees; [and] (C) Punitive damages."[48] D.C. Code § 28-3905(k)(2).

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[47] *See Kennemore v. Bennett*, 755 S.W.2d 89, 91 (Tex. 1988) (cause of action under Texas Deceptive Trade Practices Act can be waived only through "express waiver"); *cf. Mawakana v. Bd. of Trustees of Univ. of D.C.*, 113 F.Supp.3d 340, 354 (D.D.C. 2015) (explaining requirements for a legal right to be waived).

[48] A court may award punitive damages under the CPPA without a showing of actual damages. *See Griffith v. Barnes*, 560 F.Supp.2d 29, 37–38 (D.D.C. 2008) (holding that award of statutory damages was a "basis for actual damages" justifying an award of $100,000 in punitive damages). To be awarded punitive damages for a violation

Finally, a merchant's violation of the CPPA can serve as a complete defense to its affirmative claim that a consumer breached a contract with it. Under D.C. law, "[i]t is well established that misrepresentation of material facts may be the basis for the rescission of a contract, even where the misrepresentations are made innocently, without knowledge of their falsity and without fraudulent intent." *Barrer v. Women's Nat. Bank*, 761 F.2d 752, 757 (D.C. Cir. 1985); *In re Est. of McKenney*, 953 A.2d 336, 342 (D.C. 2008) (applying rescission doctrine articulated in *Barrer*). The consumer must demonstrate the merchant made an assertion or omission[49] "(1) that was not in accord with the facts, (2) that was material, [] (3) that was relied upon (4) justifiably by the recipient in manifesting his assent to the agreement . . . [and (5)] to [the consumer's] detriment." *Barrer*, 761 F.2d at 758. Proving these elements is a "defense to a suit for breach of contract." *Id.*

2. The Trial Court's Errors Regarding the CPPA

   i. The Trial Court Unlawfully Used Ms. Galvin's State of Mind and Contractual Goals as a Prejudicial Lens for Assessing Her CPPA Claims

The Trial Court erred as a matter of law by using Ms. Galvin's subjective state of mind and her contractual goals to assess RN's compliance with the CPPA rather than

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of the CPPA, a plaintiff need only show, by clear and convincing evidence, that a defendant acted in "willful disregard for the rights of the plaintiff" and the conduct was "outrageous." *Mod. Mgmt. Co. v. Wilson*, 997 A.2d 37, 55 (D.C. 2010).

[49] Non-disclosures can be considered assertions of fact for purposes of this analysis. *Barrer*, 761 F.2d at 758 (citing RESTATEMENT (SECOND) OF CONTRACTS § 161).

considering RN's trade practices from the perspective of a reasonable consumer. *Pearson*, 961 A.2d at 1075. The Trial Court cited Ms. Galvin's suggestion of possible litigation[50] during and after the transplant to conclude that her problem with the transplant was not its objective failure, but a subjective "dissatisfaction," "unhappiness," and "displeasure," which it used as a "lens" to "review and understand" her CPPA claims.[51] JA 1735:2–14, 1732:15–20, 1743:18–23. Compounding this error, the Trial Court held that Ms. Galvin could not meet the CPPA's burden of proof because RN "did not provide . . . [evergreen] screening that [she] objectively wanted but was not explicitly stated in the contract." JA 1744:10–14.[52] In so doing, the Trial Court created legally proscribed barriers to CPPA claims.

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[50] The Trial Court stated that "the presence of an attorney at the installation . . . provides a context or at least shows that at that stage, when there was no identified problem with the delivery of the products, . . . there was dissatisfaction [regarding the Trees]." JA 1735:2–11. That finding is an error of fact. Prior to transplant, RN demanded to store the Magnolias on the Embassy of Bahrain lot across the street from the Property. JA 427:15–428:23 (Burrill). Ms. Galvin exercised her contractual rights and refused its demand. JA 2079, 2192. Contrary to the Contract, RN continued the shipment, so the Magnolias had to be stored at its farm in Laytonsville, MD. JA 2070, 2147 (deposition page 76 lines 10–14), 2192. Regarding the storage problem, which is not at issue in this litigation, Ms. Galvin asked that her attorney be present. *See* JA 2192–93 (indicating the purpose of her attorney's involvement), 1627:7–23.

[51] The Trial Court overlooked the fact that all litigants (especially those sued by a subsidiary of a $300 million landscape conglomerate that misled them into entering an unsuccessful $350,000 landscaping contract) are dissatisfied and seeking accountability through litigation.

[52] To the extent the Trial Court believed the CPPA required Ms. Galvin to identify the term "evergreen screening" in the Contract to maintain her claims, *see* JA

Such claims require an analysis of a merchant's trade practices based on how they would appear to "a reasonable consumer," *Pearson*, 961 A.2d at 1075, not whether a particular claimant is worthy of protection or whether the contractual goals are clearly defined.

The Trial Court nominally recognized that the reasonable consumer standard articulated in *Pearson* governed its analysis of Ms. Galvin's CPPA claims, JA 1743:2–5, but it ultimately ignored most of her CPPA claims, and wrongly decided the others, holding they were unreasonable because they demanded "a statutory guarantee of subjective satisfaction through the CPPA," *see* JA 1743:13–17, 1744:8–14. The Trial Court likened Ms. Galvin's expectation of "evergreen screening" to the *Pearson* plaintiff's interpretation of "satisfaction guaranteed." *See* JA 1742:11–1743:17. But Ms. Galvin's claim was not based on "dissatisfaction" or "displeasure." She claimed that RN violated the CPPA when discussing facts about RN's activities and meeting the mutually agreed evergreen screening goal, and that those misrepresentations and omissions would have tended to mislead a reasonable consumer about the chances of achieving that goal. *See supra* pp. 15–17.

1741:25, 1743:11–16, that is an error of law. *See Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1004 (D.C. 2013) ("a person can violate the CPPA 'whether or not he entered a formal contractual relationship or received money for the services") (quoting *Byrd v. Jackson*, 902 A.2d 778, 781 (D.C. 2006)).

Had the Trial Court faithfully applied *Pearson*, it would have examined whether RN made truthful disclosures about its ability to provide evergreen screening and the expectations of a reasonable consumer in Ms. Galvin's position. Every consumer, merchant, and expert that testified on the record knew what constituted evergreen screening.[53] *See*, *e.g.*, JA 138:1–5 (Lewis). Viewed through the "lens of a common understanding," JA 1743:10, Ms. Galvin's allegations regarding "evergreen screening" are anything but "subjective," *cf. Alce*, 2018 WL 1737750, at *8 (describing the reasonable consumer standard as an "objective, contextual analysis"); *Carter v. Gugliuzzi*, 168 Vt. 48, 56, 716 A.2d 17, 23 (Vt. 1998) (describing the reasonable consumer and materiality standards as "objective").

ii. The Trial Court Created a Flawed Standard of Materiality Based on the Merchant's Discretion

The Trial Court further misconstrued the CPPA by holding that "what is a material risk to trees that must be disclosed to a consumer is subject to [a merchant's] considerable discretion." JA 1744:15–20.[54] In so ruling, the Trial Court ignored Ms. Galvin's claims under §§ 3904(a) and (d) (that RN misrepresented that the services

[53] Dr. Dahle defined the term "evergreen" as "a description of how long [trees] hold their leaves," which should be "for multiple years." JA 927:21–25 (Dahle).

[54] The only basis for the Trial Court's novel conception of materiality was its misplaced reliance on one aspect of Dr. Dahle's testimony. JA 1744:15–20. Dr. Dahle, however, was qualified as an expert to testify about the biomechanics of trees. *See supra* p. 20. He was not qualified to opine on either the materiality of facts to consumers or the CPPA's requirements.

and Trees it supplied would provide evergreen screening) which do not require proof of materiality. *See supra* p. 30 note 37. The "discretion" of the merchant is not relevant to an analysis of CPPA claims because the materiality of a fact turns on a reasonable consumer's perspective. *See Saucier*, 64 A.3d at 442.[55]

Further relying on merchant discretion, the Trial Court held that the many conditions of summer planting that presented risks to the Project were disclosed to Ms. Galvin because of (1) what it called an "explicit" reference of this risk in the LSGs (which says it is safe to *plant year round if proper procedures are applied* and does not explain the specific challenges of summer planting), and (2) Mr. Proskine's June 6, 2020 email (which explicitly disavowed any challenge to summer planting). JA 1744:21–1745:11. The Trial Court adopted RN's position that such statements amounted to a sufficient disclosure under the CPPA. Had it considered the consumer's perspective, as required under the CPPA, the Trial Court could not have found that stating summer planting is "safe" adequately discloses the challenges presented by summer planting. *See supra* pp. 18–19.[56]

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[55] The Trial Court's interpretation leads to absurd results. Providing a merchant with that "discretion" only encourages merchants to misrepresent or omit critical details required for a consumer to make informed decisions. *See*, *e.g*, *supra* p. 9. How can a merchant have "discretion" under a statute of which it was ignorant before contracting? *See* JA 211:21–212:5 (Lewis).

[56] The Trial Court's finding is also an obvious factual error. The LSG provision stating "[i]t is safe to plant year round if certain criteria are followed" did not explicitly reference a heightened risk of summer planting. JA 2360. This finding is

iii. The Trial Court Misapplied the Clear and Convincing Evidence Burden of Proof to CPPA Claims That Did Not Allege Intent

The Trial Court further held that the alleged "violations of the CPPA must . . . be proven by clear and convincing evidence," again citing *Pearson* as "controlling." JA 1742:13–21. It ignored Ms. Galvin's arguments that she was not subject to the clear and convincing evidence standard because she did not allege intentional violations of the CPPA. *See* JA 1498:13–20 (Galvin), 1647:14–1649:14 (Galvin Counsel); *supra* pp. 32–33.

iv. The Trial Court Erroneously Claimed that a Contractual "No Warranty" Provision Obviates a Consumer's CPPA Claim

In characterizing Ms. Galvin's CPPA claims, the Trial Court stated, "[Ms. Galvin's] position is that the explicit statement of no warranty in the written contract is essentially superseded by . . . the CPPA." JA 1743:13–17. The Trial Court seems to have concluded that a contract's express recognition of no replacement warranty on a merchant's goods precludes a consumer's rights under the CPPA. The CPPA is to the contrary. *See supra* p. 34. Ms. Galvin's decision not to purchase the Warranty affects only her contractual rights, not her CPPA claims. In any event, the absence

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even more incredulous considering that statement is mentioned only once in an 80+ page industry guidebook referenced in the Contract. Similarly, Mr. Proskine's email did not address the heightened risk involved with summer planting, and his use of the term "thrive" implies that summer planting may be optimal. *See supra* p. 7. If the Trial Court's finding is correct, a merchant's unqualified answer of "there is no risk" counts as an adequate disclosure of many material risks.

of the Warranty was not a complete waiver of her statutory rights, which the Trial Court recognized by applying the implied warranty of merchantability. *See* JA 1739:25–1741:15.

v. Errors Regarding the Maple

The Trial Court held that Ms. Galvin's CPPA claims regarding the Maple could not "survive or meet the clear and convincing evidence standard" because she did not show that the "Maple tree died of Armillaria." JA 1739:7–12. The Trial Court stated that it would consider "the evidence of damage to the Maple" only as a "defense to the breach of contract," JA 1737:4–22, and believed "the claim that the Maple died from Armillaria" was "dispositive," JA 1738:4–6. But that was not what Ms. Galvin alleged. She claimed that RN violated the CPPA (not the Contract) by failing to disclose (1) that it would not comply with the tree protection provisions of the LSGs and (2) the potential harm associated with digging the hole for the Cryptomeria too close to the Maple's roots. The Trial Court never considered that claim.

Even if (1) liability under the CPPA required showing actual damages (which it does not),[57] and (2) Mr. Shaw's principal conclusion regarding the Maple's death was the infection of Armillaria in particular (which it was not, *supra* p. 22), the Trial

[57] The plain language of the CPPA makes clear that the viability of a CPPA claim does not turn on the existence of actual damages. D.C. Code § 28-3904. The Trial Court's holding unlawfully imposed tort principles into a CPPA analysis.

Court also erred as a matter of law in substituting its judgment for that of an expert. The Trial Court relied solely on the fact that Mr. Shaw "did not have any affirmative tests or lab results to confirm [the Armillaria] diagnosis." JA 1738:17–23. However, Mr. Shaw testified to a reasonable degree of professional certainty that the Maple was infected with Armillaria without need for a lab test. *See supra* pp. 21–22. The Trial Court, without basis in D.C. law, [58] held that Mr. Shaw's unrebutted conclusion was insufficient and unlawfully ignored Mr. Shaw's broader unrebutted conclusion that RN's digging within the CRZ was the root cause of the Maple's death.[59]

B. This Court Can Find RN Liable for Its CPPA Violations and That Those Violations Constitute a Rescission of the Contract.

Ms. Galvin claimed that RN rescinded the Contract by violating the CPPA. Def.'s Suppl. Auth. and Resp. to Ct.'s Inquiry at Oral Ar. at 2 (citing *Barrer*). RN made many pre-Contract misrepresentations and omissions of material facts that established clear violations of the CPPA. *Supra* pp. 15–17. RN presented no contrary evidence or argument to her claims other than its faulty notion that a merchant can

[58] *See In re Melton*, 597 A.2d 892, 903 (D.C. 1991) (The judge may not substitute his or her judgment for the expert's as to what data are sufficiently reliable, provided that such reliance falls within the broad bounds of reasonableness. The proper inquiry is not what the court deems reliable, but what experts in the relevant discipline reasonably deem it to be.).

[59] The Trial Court erred in finding that "experts [] gave conflicting evidence as to the cause of [the Maple's] death;" JA 1738:18–19, and that Dr. Feather, RN's expert witness, "stated that Armillaria was not the cause of death." JA 1739:1–3. Dr. Feather's testimony did not undermine Mr. Shaw's evidence-based conclusions regarding the death of the Maple from root cutting. *See supra* pp. 22–23.

unilaterally determine materiality under the CPPA. And in unrebutted testimony, Ms. Galvin testified that her justifiable reliance on RN's misrepresentations and omissions led her to enter the Contract to her own detriment. *Supra* p. 14. The Trial Court did not consider any of these uncontested facts[60] because of its faulty and legally unsubstantiated view of the CPPA. This Court may therefore find that (1) RN violated the CPPA, and (2) RN's violation of the CPPA constitutes a rescission of the Contract, nullifying RN's breach of contract claim.[61] *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (explaining the "elementary" proposition that "where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless* the record permits only one resolution of the factual issue.") (emphasis added).

C. If There is a Valid Contract, the Trial Court Erred as a Matter of Law in its Holding That Ms. Galvin Breached the Contract and RN Did Not.

It is well established under D.C. law that to prevail on a claim of breach of contract a plaintiff "must establish (1) a valid contract between the parties; (2) an obligation

[60] These facts include: (1) RN's numerous representations that its goods and services would provide evergreen screening, (2) the reasonable consumer's understanding that the Trees do not provide evergreen screening, (3) RN represented that summer planting was safe without equivocation, (4) RN represented that it would comply with the LSGs when it did not do so, and (5) RN did not notify Ms. Galvin that it would cut within the Maple's CRZ.

[61] The Trial Court claimed that there was "a valid contract" because the parties did not "dispute that there was a valid contract." JA 1733:3–5. That is an error of fact because Ms. Galvin argued RN rescinded or repudiated the Contract.

or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015) (quoting *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009)).[62]

A contract must be interpreted as a whole, giving every term an effect. *See Steele Foundations, Inc. v. Clark Const. Grp., Inc.*, 937 A.2d 148, 154 (D.C. 2007). If a contract incorporates another document by reference, such reference "renders [the document] part of the agreement for [the] indicated purposes." *Bode & Grenier, L.L.P. v. Knight*, 31 F.Supp.3d 111, 117 (D.D.C. 2014), *aff'd sub nom. Bode & Grenier, LLP v. Knight*, 808 F.3d 852 (D.C. Cir. 2015). Thus, a merchant's contractual duties to a consumer are to be determined by considering the contract—and its incorporated documents—in their entirety.

Under D.C. law, consumers are entitled to an adequate assurance of performance when reasonable grounds for insecurity arise regarding a merchant's performance in a contract for the sale of goods. D.C. Code § 28:2-609. When such insecurity arises, a consumer may demand adequate assurance in writing and until the consumer receives such assurance may, if commercially reasonable, "suspend any performance for which [the consumer] has not already received the agreed return."

[62] Courts in other jurisdictions often recognize that a plaintiff must demonstrate performance of its own contractual obligations to prove another party breached a contract. *See*, *e.g.*, *Acme Pest Control Co. v. Youngman*, 216 S.W.2d 259, 263 (Tex. Civ. App. 1948).

Id. § 28:2-609(1). A merchant's failure to adequately assure performance within 30 days results in a repudiation of the contract. *Id.* § 28:2-609(4).

The Trial Court committed two principal errors of law when ruling on the parties' contract claims: (1) failing to recognize RN's explicit obligation to comply with the LSGs, and, instead, holding that RN's only contractual duties were to deliver, install, transfer maintenance of, and conduct six weeks of monitoring of the Trees, JA 1733:7–10; and (2) effectively holding that RN's breach of contract claim could survive even if RN repudiated the Contract by failing to provide Ms. Galvin with an adequate assurance of performance under D.C. Code § 28:2-609(4).

The Contract required RN's work to be done "in accordance with the Landscape Specification Guidelines." JA 2075.[63] The Contract's reference to the LSGs represented the supposed quality of RN's work *and* a contractual guarantee that RN's performance would not deviate from specific industry standards. *See* JA 115:10–13 (RN counsel) (explaining that the Contract "expressly incorporates" the LSGs and stating that RN "told Ms. Galvin [it was] going to live by what's in the landscape specification guidelines."). To prevail on its breach of contract claim, RN

[63] The indicated purpose of these referenced LSGs was to ensure RN's work was done with particular care, consistent with industry standards. *See* JA 863:11–20 (Schwartz) (industry standards "provide a . . . minimum level of performance standard," including "identifying risks to trees that may be transplanted").

had to prove compliance with the LSGs; otherwise, Ms. Galvin did not have "an obligation or duty arising out of the contract." *See Francis*, 110 A.3d at 620.

The Trial Court's determination that RN "fulfilled its contractual obligation" by merely "install[ing] six trees and then [] hav[ing] a transfer of maintenance, and then, also, a monitoring period of six weeks," JA 1733:6–10, was an error of law. RN did not even attempt to prove its compliance with the LSGs. RN provided no evidence it (1) conducted a suitability assessment, *supra* p. 10 note 13, (2) implemented the "certain criteria" required to make "year round" planting safe,[64] (3) took the required tree protection procedures outlined in the LSG's "Tree Preservation" section, *supra* p. 21, and (4) root pruned the Cryptomeria before transplant, *supra* p. 10 note 15.

The Trial Court also erred as a matter of law by concluding RN could prevail on its contract claim when RN never provided Ms. Galvin with an adequate assurance of performance. By failing to provide assurance, RN repudiated the Contract and therefore cannot prove Ms. Galvin breached. D.C. Code § 28:2-609(4).

D. The Trial Court Erred as a Matter of Law by not Resolving All Material Issues.

[64] RN argued three facts that might be construed as compliance with those certain criteria: (1) Mr. Proskine's visit to Florida, (2) using tarps to cover the Magnolias, and (3) using containerized Magnolias. Pl.'s Proposed Findings of Fact and Conclusions of Law at 14 (July 31, 2023). But RN did not prove that these measures were sufficient, and the testimony of Dr. Dahle establishes that whatever measures were taken, they were insufficient. *See* JA 907:12–911:10 (Dahle) (discussing the need for a landscape contractor to analyze existing drainage systems, site conditions, and soil compatibility for successful transplants of large, containerized trees).

A trial court must make "findings on material issues"; otherwise, this Court will be "unable to apply the law intelligibly to the facts of this case and must remand the case for further proceedings." *Tauber v. D.C.*, 511 A.2d 23, 28 (D.C. 1986).

The Trial Court held that RN did not violate the CPPA because (1) merchants have considerable discretion in determining what must be disclosed to consumers, and (2) there was "evidence" that the risks related to summer planting were disclosed to Ms. Galvin. *See supra* pp. 23–24. This narrow holding ignored several allegations pleaded by Ms. Galvin under the CPPA. Ms. Galvin alleged CPPA violations under §§ 28-3904(a), (d), (e), and (f) about RN's representations and omissions related to risks of the Project, business practices, and pre-Contract assurances. *See* JA 076–078; DPFFCL at 13–15. The Trial Court's failure to rule on all her CPPA claims except for the claim pertaining to risk of summer planting left unresolved material issues on the table. This was an error of law.[65]

The Trial Court also erred as a matter of law by failing to rule on three of Ms. Galvin's distinct contract claims. Ms. Galvin alleged that (1) RN repudiated the

[65] Perhaps the Trial Court committed this error because it erroneously viewed the CPPA as imposing a "duty to warn of risks" rather than a duty to inform the consumer of material facts. *Compare* JA 1741:16–21 *with District of Columbia v. Meta Platforms, Inc.*, 2023-CAB-006550, 2023 WL 11921682, at *10 (D.C. Super. Ct. Sept. 9, 2024) (rejecting proposition that case law about "common law failure to warn claims" applies to statutory CPPA claims because under § 3904(f), e.g., merchants have "a duty . . . to disclose information if the information is material and if a failure to disclose the information has a tendency to mislead."); D.C. Code § 28-3901(c) (establishing consumer's right to truthful information).

Contract because, having reasonable grounds for insecurity, she requested RN to provide her with an adequate assurance of performance and RN never provided it.[66] In addition, the Trial Court did not acknowledge Ms. Galvin's distinct breach of contract claims relating to RN's failure to comply with the LSG requirements regarding (2) suitability assessments, including summer planting, and (3) root pruning. *See* JA 1735:16–22; *supra* p. 16.

E. The Trial Court Erred as a Matter of Law on the Implied Warranty of Merchantability

For a good to be merchantable, it must be fit for the ordinary purposes for which it is used. D.C. Code § 28:2-314(2)(c). The ordinary purpose of a good is determined by how a reasonable buyer would expect the good to perform under the circumstances of the transaction. *Golden v. Den-Mat Corp.*, 47 Kan. App. 2d 450, 485, 276 P.3d 773, 797 (2012). A reasonable consumer in this transaction would expect RN to provide Trees with immediate and lasting evergreen screening—the ordinary purpose of $50,000+ Trees. JA 730:24–731:5 (Musick). The Trees suffered from transplant shock, which quickly deprived them of their evergreen screening qualities. *See supra* pp. 20–21. Instead of considering this perspective, the Trial

[66] If the Trial Court wished to find that Ms. Galvin's claim failed, it had to either rule that RN provided the required assurance or that Ms. Galvin did not have "reasonable grounds for insecurity . . . with respect to the performance" of RN. D.C. Code § 28:2-609(1). But it held neither, ignoring Ms. Galvin's claim.

Court, *sua sponte*, evaluated the merchantability of the Trees using the LSG's recommended standard warranty.[67] JA 1740:11–18; JA 2362.

The Trial Court did not even honor its own arbitrary standard. It ignored that the LSGs required the Trees to be "alive" *and* "in satisfactory growth." *Compare* JA 2362 *with* JA 1740:11–18. The Trial Court compounded its legal error by arbitrarily placing a time limitation (death before the monitoring period had expired) on its own metric. JA 1740:19–23. It therefore provided relief only regarding the Dogwood. JA 1741:4–15.[68]

F. The Trial Court Wrongly Denied Reconsideration or Amendment of Its Opinion

The Trial Court erred as a matter of law in denying Ms. Galvin's Motion for Reconsideration and Other Relief and abused its discretion in denying her Motion Pursuant to Rule 52(a)(1). The Trial Court denied Ms. Galvin's Motion for Reconsideration because she was "relitigating" issues it already decided. But "Rule 59(e) allows a party to reargue previously articulated positions to correct clear legal error." *Hayes Fam. Tr. v. State Farm & Cas. Co.*, 845 F.3d 997, 1005 (10th Cir. 2017). To the extent Ms. Galvin "relitigated" her previous positions, it was only to

[67] The claim the LSG warranty was "the warranty that the parties, in their contract, expressly did not include," JA 1731:12–13, was an error of fact. *Supra* p. 26 note 34.
[68] The Trial Court erred as a matter of fact by concluding that the Cryptomeria and Hemlock were not dead within one year. *Compare* JA 1732:6–9; 1740:19–20 *with supra* pp. 14 note 20, 15 note 21.

correct the Trial Court's legal error. Far more of her motion discussed the novel legal errors made in the Opinion (which could not have been "relitigated"). *See*, *e.g.*, *supra* pp. 38–39. Moreover, the motion addressed disputes that the Trial Court failed to even acknowledge in its Opinion. *Supra* pp. 47–48.[69]

The Trial Court denied Ms. Galvin's Rule 52(a)(1) Motion because it determined that its reasoning was "sufficiently addressed on the record." But this is a circular argument that ignores the lack of legal and factual citations to support the Trial Court's rationale. And the Opinion itself is scattershot, making it difficult to discern the legal and factual grounds on which the Trial Court relied.

VIII. CONCLUSION

Ms. Galvin respectfully requests this Court reverse the Trial Court's Judgment regarding her CPPA and implied warranty claims. Since Ms. Galvin's CPPA claim that RN did not provide the information a reasonable consumer would expect to know in deciding whether to sign the Contract proposed by RN is undisputed as a matter of fact, the Court should hold that RN's CPPA violation serves as a complete defense to its breach of contract claim, and remand for further proceedings consistent with the Court's orders on the issues raised in this appeal.

[69] The Trial Court also denied Ms. Galvin's Motion for Reconsideration because it had "already addressed" the issues she raised. But this Court requires a Rule 59(e) motion to "be addressed to matters already of record." *Coleman v. Lee Washington Hauling Co.*, 388 A.2d 44, 46 n.5 (D.C. 1978).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 21st day of October, 2024, a copy of the foregoing was served via the Court's electronic filing and service system on all parties:

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